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An interview of James Meese

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James Meese: I want to begin by saying thank you so much for inviting me to talk with you. It's a fantastic opportunity to discuss some of the ideas that have emerged from my research.

Claire Larsonneur: One does not usually associate the legal notion of copyright and the philosophical or psychological concept of subjectivity: what led you to that connection?

JM: The monograph (Meese 2018) emerged from my doctoral dissertation. It was the specific nature of this research process that led me to identifying subjectivity as an interesting area to focus on. I started this project because I had always been fascinated with copyright, a complicated regulatory framework that purported to organize the complex web of relationships between creative producers, cultural intermediaries, transnational economic systems and a broader public. However, my disciplinary background was in cultural studies and media and communications and I needed to further my understanding of legal theory and philosophy. Through my reading in this area, I discovered critical legal scholarship and found that a number of legal scholars had spent decades interrogating power relations and subjectivity, drawing on philosophers like Michel Foucault. Moreover, some of these scholars were formidable intellectual property scholars in their own right, like James Boyle and Rosemary Coombe. Their focus on the legal subject interested me because Australia had undergone a series of copyright reforms, where the subjects (and objects) of these reforms were viewed as easily identifiable by policymakers. The government had introduced reforms that were supposed to help authors and users and punish pirates. It seemed to me that these subjects were identified with too much ease. I felt that this clear demarcation of legal subjects was not an ideal way of conceptualising copyright and did not recognize the complexity of the relations between subjects, or the broader power relations and economic forces that contextualised them.

CL: At the core of your argumentation stands the notion of relational subjectivity. Could you explain it?

JM: Funnily enough, relational subjectivity is a foundational tenet of copyright law. It essentially means that we can all be authors, pirates or users and often are situated in relation to multiple subjectivities simultaneously (for example, I've authored copyrighted works and also use them). However, because this is such an obvious point for many copyright scholars, the phenomenon has not been studied in much depth. Moreover, although this is a foundational premise of copyright law, it tends to directly clash with some of the legal and political concepts that underpin the law, for example, the premise that the author is an individual rights holder. This is a position that doesn't sit well with the relational logic that underpins copyright. Carys Craig was the first to note this in her excellent monograph *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (2011). In this work Craig argues that approaching the author as an individual "bearer of rights and owner of property" is harmful and that the author should be viewed as "a participant in a process of cultural dialog and exchange" (Craig 2011: 3). Building upon this provocation, Craig makes the case that users should no longer be considered as "actual or potential trespassers or pirates" (Craig 2011: 3) and also challenges the supposed fixity of a copyrighted work. I see my work as directly building from Craig's original intervention. While she has done the much more difficult theoretical and conceptual work of articulating a space to work in, I've contributed to Craig's notion of relational authorship by exploring what relational users and pirates might look like in this overarching model and also explored how relational subjectivity is supported (or ignored) in particular jurisdictions and specific cases.

CL: In what ways have digital technologies (search engines, social media, streaming, peer-to-peer networks) disrupted the field of authorship, and subsequently copyright?

JM: All of these have impacted on copyright law to some degree but I'm not sure that all of those examples have challenged authorship. Peer-to-peer technology challenged distribution models that were bound up with the operationalising of copyright law and these distribution pathways have since been reconfigured thanks to streaming. The development of the Google algorithm has raised issues around publication as they relate to defamation law in some jurisdictions but, similarly, don't really go to the heart of authorship. I think social media is the more interesting issue with this regard. The widespread distribution that can occur with content online is obfuscating authorship and often making it harder for authors to either gain credit or make money. I'm currently doing research around this issue and finding that people think that correctly attributing authors is much more important in a digital environment.

CL: In your introduction, you claim that "the author and the notion of authorship [are] at best a bundle of competing ideologies and at worst an 'intellectually unstable [and] essentially bankrupt category, underdeveloped both conceptually and doctrinally." Could you expand on that?

JM: It's an argument made by Kathy Bowrey, but I subscribe to it. I won't speak for her, but my reading of this intervention is that copyright law is a highly technical law that makes a lot of arbitrary definitions between what is, and isn't, authorship without a substantive conceptual base underlying these decisions. Copyright law is not simply legalizing what is evidently authorship but is ultimately always identifying authorship whilst being influenced by various social, cultural and

economic factors. Legislation and case law rarely address these influences and so fail to develop a strong conceptual or doctrinal basis to support these decisions. The work of Christopher Buccafusco helps to illustrate this intervention. For example, he notes that copyright law does not protect systems and processes but it does protect software code. Arguably, this is because of an economic and political decision made with reference to the ability to economically exploit software code rather than some sort of inherent authorship that is present in that work. Other forms of authorship are not so easily recognised by copyright law and there is a large body of feminist legal scholarship that explores this issue.

CL: You claim that "studying subjectivity provides a way to explore the various narratives that are constructed for copyright within and beyond law." Could you give us an example?

JM: A productive example is the major debates that occurred around online piracy following the attempted introduction of the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA) in the United States. There was an attempt to better enforce online copyright infringement occurring on offshore websites. However, as has been well documented, the scope of the legislation would potentially threaten the functional operation of the internet, even within the USA. In this sense, the proposed law constructed online copyright infringement as a foundational wrong that should be addressed by every potential actor within the scope of this new Internet governance regime. What was interesting is that the public response did not challenge this presentation of the pirate. Protesters in Western countries simply adopted the subject position of the user and argued that their "use" of the Internet was at threat. Despite the fact that online copyright infringement was still occurring in the United States (for example), protesters from that country wholly rejected their interpellation as a pirate and implicitly supported the bill's location of piracy as a non-Western activity, but rather an Asian or Russian activity. Two contrary legal narratives are being articulated, which is relatively obvious. However, an analysis of subjectivity allows us to see in this case how actors enact these counter-narratives, and what sort of subject positions they strategically draw on in order to make their protest legitimate, authentic and (hopefully) successful.

CL: What are some of the national variants in copyright law and the cultural constitution of authors, users and pirates?

JM: To pick one comparison, despite stemming from a somewhat similar legal history, a recent set of reforms in Canada have seen a radically redefined set of relationships between the author, user and pirate emerge, when compared with Australia. A series of decisions by the Canadian Supreme Court led to a much more flexible set of fair dealing exceptions that starts to come close to the broad fair use provisions offered in the United States. Subsequently, there is a relatively large space for users to operate in and a clear recognition of the intersections between authorship and use. Conversely, Australia still retains a strict set of fair dealing exceptions and has a much more limited understanding of authorship, one that falls short of the relational authorship that I would support. In Australia, users are largely treated as prospective pirates with limited freedom to engage in non-compensated uses of copyrighted material, which can limit creativity and innovation.

CL: You argue that copying and more generally copyright infringement can actually be good to business: how does that work?

JM: Relying on copying to support growth is a long running business strategy but is one that is particularly important today. Particularly when it comes to media content, models of scarcity that have traditionally driven business strategies are no longer profitable to the same extent as they were in the past, and in some cases not viable at all. This is partly because traditional models of ownership are being challenged, as Aaron Perzanowski and Jason Schultz explore in their work *The End of Ownership* (2016). This means that, in many cases, content needs to be shared widely and without restriction to support growth and build economic income. This does not mean that it spreads without regulation but rather that attribution becomes much more important to regulate that enforcing scarcity. It is important to also note that, firstly, a range of industries are successful despite allowing widespread copying to occur (as detailed in my book) and, secondly, that the media industry has a long and complex history of informal distribution, which is explored in much more detail in the book *The Informal Media Economy* by Ramon Lobato and Julian Thomas (2015).

CL: What in your mind would be the ideal approach to copyright today?

JM: I can't articulate an entire philosophical approach, but I can think of some reforms I would like to see enacted. I would like more leeway for people to make use of existing copyrighted materials and loosen the absurd amount of control that owners retain over a replicable creative work. It feels ridiculous repeating something noted by Lawrence Lessig in the late 90s, but the permission culture that still exists around copyrighted works is now dangerously outdated. Attribution is a much more valuable commodity that should be treated with more care than the inordinate focus placed on replication of parts of a copyrighted work. I think a shorter period of copyright is also needed. I strongly support the need for creators to get paid for their labour but would limit the term to "at death". In addition to (or alternatively), there is a lot to be said for reintroducing registration in order to keep better track of orphan works and make sure that owners are actively seeking protection rather than just immediately placing all creative work (no matter how minimal) within the confines of a restrictive legal framework.

BIBLIOGRAPHY

Bowrey, Kathy. *Law and Internet Cultures*. Cambridge: Cambridge UP, 2005.

Boyle, James. *Bound by Law? Tales from the Public Domain*. Durham: Duke UP, 2006.

University Press. *Public Domain: Enclosing the Commons of the Mind*. Yale: Yale UP, 2008.

Buccafusco, Christopher. "Making Sense of Intellectual Property Law", *Cornell Law Review* (501) 2012.

Coombe, Rosemary. *Dynamic Fair Dealing: Creating Canadian Culture Online*. Toronto: U. of Toronto P., 2014.

Coombe, Rosemary. *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law*. Durham: Duke UP, 1998.

Craig, Carys J. *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law.* Northampton: Edward Elgar, 2011.

Lobato, Ramon, and Julian Thomas. *The Informal Media Economy.* Cambridge: Polity Press, 2015.

Meese, James. *Authors, Users and Pirates: Copyright Law and Subjectivity*. Cambridge (MA): MIT Press, 2018.

Perzanowski, Aaron and Jason Schultz. *The End of Ownership: Personal Property in the Digital Economy*. Cambridge (MA): MIT Press, 2016.

ABSTRACTS

In current debates over copyright law, the author, the user, and the pirate are almost always invoked. Some in the creative industries call for more legal protection for the authors; activists and academics promote user rights and user-generated content; and online pirates openly challenge the strict enforcement of copyright law. James Meese offers a new way to think about these three central subjects of copyright law, proposing a relational framework that encompasses all three. Meese views authors, users and pirates as interconnected subjects, analyzing them as a relational triad. He argues that addressing the relationships among the three subjects will shed light on how the key conceptual underpinnings of copyright law are justified in practice. His work rests on the comparative analysis of the legal situation in Australia, the United States, the United Kingdom and Canada.

Les figures de l'auteur, de l'utilisateur et du pirate reviennent sans cesse dans les débats autour de la propriété intellectuelle, et particulièrement du copyright anglo-saxon. Au sein des industries culturelles, certains réclament plus de protection pour les auteurs alors que les universitaires et les militants mettent en avant les droits des utilisateurs et les contenus qu'ils créent. Pendant ce temps les pratiques courantes de piraterie en ligne (téléchargements, streaming) remettent en question l'application stricte des dispositifs légaux de protection des œuvres. James Meese propose une approche nouvelle de la propriété intellectuelle en se focalisant sur l'ensemble des relations qui lient l'auteur, l'utilisateur et le pirate. Il les voit comme des sujets interconnectés, une triade relationnelle. L'analyse de leurs relations lui permet d'étudier comment les fondements intellectuels du droit du copyright sont justifiés en pratique. L'étude compare la situation dans divers pays : Australie, États-Unis, Royaume Uni et Canada.

INDEX

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